

No. 84-139

Office: Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS. CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CLARENCE R. YEAGER DISTRIBUTING, INC.

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

and

ARIZONA STATE DISTRICT COUNCIL
OF CARPENTERS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF FOR CLARENCE R. YEAGER
DISTRIBUTING, INC.

Daniel F. Gruender
Jordan Jay Yudien
David N. Farren
SHIMMEL, HILL, BISHOP & GRUENDER, P.C.
3700 North 24th Street
Phoenix, Arizona 85016
Tel: (602) 224-9500
Attorneys for Petitioner
Clarence R. Yeager Distributing, Inc.

The Board erroneously contends Yeager did not advance his Section 10(b) limitations defense in the underlying Board proceedings (Br.Opp.8). This simply is not true. The Board and Union briefed and argued this defense throughout these proceedings. In his request for reconsideration and/or rehearing filed with the Board on June 25, 1984, Yeager specifically requested the Board

To reconsider [Yeager's] arguments that under Local Lodge No. 1424, I.A.M. v. N.L.R.B. (Bryan Manufacturing), 362 U.S. 411 (1960), the Board is precluded from relying on pre-10(b) evidence to prove the existence of a violation within the 10(b) limitations period.

The Union responded:

These are the very same arguments previously raised by the Respondent both before the Board and before the Ninth Circuit.

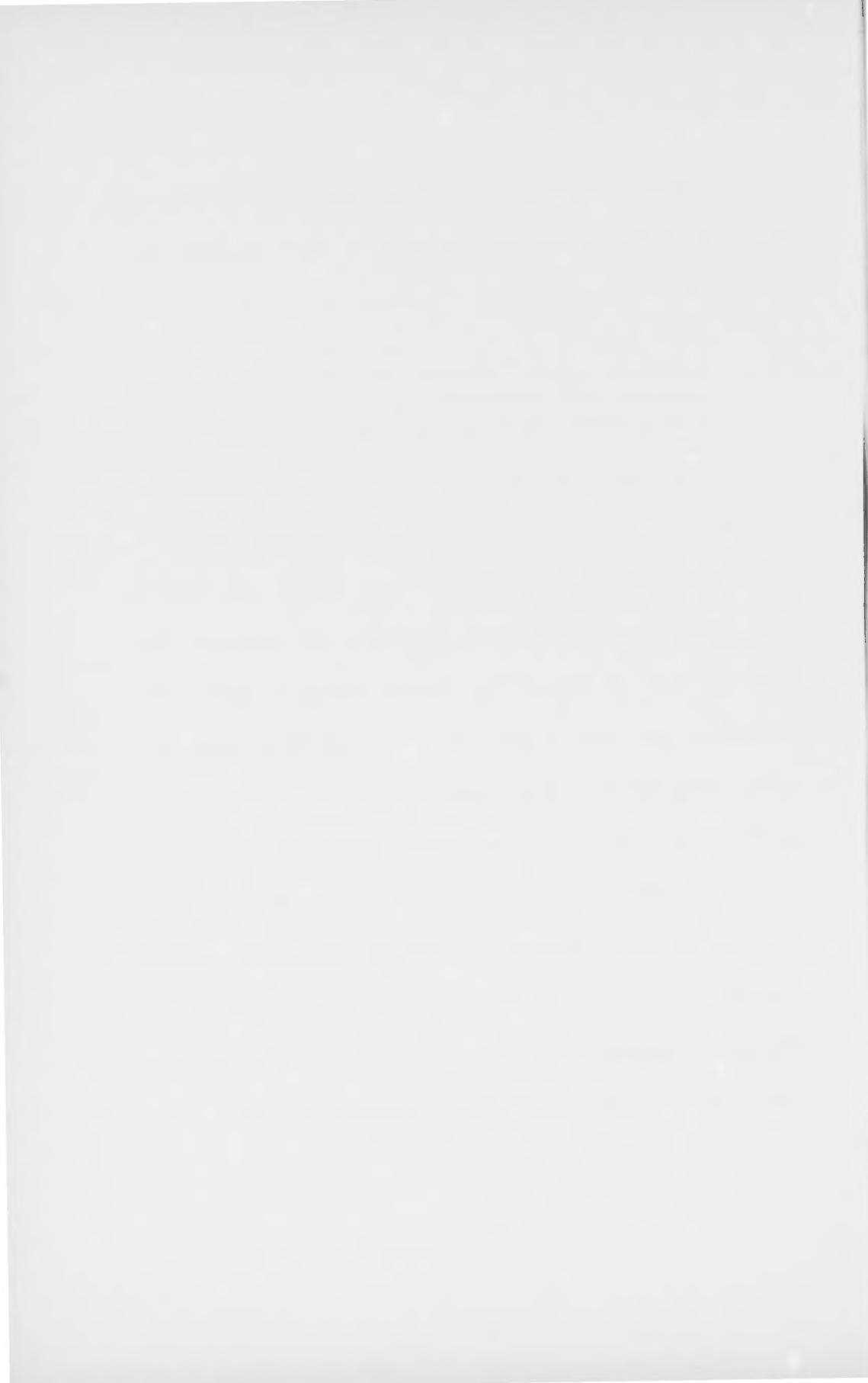


The Board, in its Order Denying Motion (attached as Appendix N), ruled in favor of the Union:

The Board . . . is of the opinion that [Yeager's] motion raises no matters not previously considered by the Board.

Yeager's Section 10(b) defense is therefore properly before this Court.

Moreover, the Section 10(b) defense was fully briefed and argued on appeal to the Ninth Circuit by both Yeager and the Board. At no time, either in written or oral argument, did the Board or Union assert that Yeager was precluded by Section 10(e) from raising the Section 10(b) defense. The Ninth Circuit decided this issue on its merits (Pet.App. 5a-6a). Yeager reasserted the defense in his petition for rehearing and suggestion for re-



hearing en banc, and again, neither the Board nor the Union objected to the argument as untimely raised.

The Board has waived its right in these proceedings to raise Section 10(e) as a basis for precluding consideration of Yeager's limitations defense, and it should be estopped from doing so before this Court.

For the reasons stated in the petition for writ of certiorari, Yeager requests that the Court review and remand the decisions below.

RESPECTFULLY SUBMITTED this 9th day of October, 1984.

SHIMMEL, HILL, BISHOP & GRUENDER, P.C.

Daniel F. Gruender
Jordan Jay Yudien
David N. Farren
3700 North 24th Street
Phoenix, Arizona 85016
Attorneys for Petitioner
Clarence R. Yeager
Distributing, Inc.



APPENDIX N

Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARDCLARENCE R. YEAGER
DISTRIBUTING, INC.

and

Case 28-CA-5578

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, ARIZONA
STATE DISTRICT COUNCIL OF "
CARPENTERS AND ITS CONSTITUENT
LOCALS: 906, 1061, 1089, 1100,
1153, 1216, 1327, 2763, 857 and
MILLWRIGHT LOCALS 1914 and 1182

ORDER DENYING MOTION

On 13 May 1982 the Board issued a Decision and Order 1/ granting the General Counsel's Motion for Summary Judgment and finding Respondent in violation of Section 8(a)(1) and (5) of the Act based on, inter alia, Respondent's withdrawal of recognition of the Union, repudiation of the existing terms and conditions of employment, and unilateral changes in the existing terms and conditions of employment. On 26 September 1983 the United States Court of



Appeals for the Ninth Circuit enforced the Board's Order in its entirety. On 25 April 1984 the circuit court denied Respondent's Request for Reconsideration and/or Rehearing en banc.

On 25 June 1984 Respondent filed with the Board, in connection with the Board's underlying Decision and Order, a Request for Reconsideration and/or Rehearing. Respondent moves the Board to seek a remand of this matter from the court and to request the court to vacate its judgment.

The Board, having duly considered the matter, is of the opinion that Respondent's motion raises no matters not previously considered by the Board.

Accordingly,

IT IS ORDERED that Respondent's Request for Reconsideration and/or Rehearing is denied.



Dated, Washington, D.C., 10 July
1984.

By direction of the Board:

Joseph E. Moore

Associate Executive Secretary

1/ 261 NLRB 847.